COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2)(b)}

Description of the Case

Criminal Appeal No.623 of 2001

(Old case No.2337 of 1989)

1. Vinod Kumar alias Vinod Buchar,
   son of Pyare Lal, R/o Pharsunda Khal Padulsyu,
   Police Station Pauri.
   District Pauri Garhwal
2. Mumtaz Buchar, son of Imtiaz Mohammad,
   R/o Village Kandoliya Khal,
   Distict Pauri Garhwal
   Police Station Pauri
   District Pauri Garhwal .....Appellants

Versus

The State of Uttar Pradesh .....Opposite Party

Sri U.P.S. Negi, learned counsel for the appellants
Sri Harish Pujari, learned Addl.G.A. for the State.

Approved for reporting.
~~Not approved for reporting~~.

Dated: 27.10.2007

(Dharam Veer, J.)

COURT NO.7

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No.623 of 2001

(Old Case No.2337 of 1989)

1. Vinod Kumar alias Vinod Buchar,
   son of Pyare Lal, R/o Pharsunda Khal Padulsyu,
   Police Station Pauri,
   District Pauri Garhwal
2. Mumtaz Buchar, son of Imtiaz Mohammad,
   R/o Village Kandoliya Khal,
   Police Station Pauri
   District Pauri Garhwal .....Appellants

Versus

The State of Uttar Pradesh .....Opposite Party

Sri U.P.S. Negi, learned counsel for the appellants
Assisted by Sri Awanish Negi, Advocate.
Sri Harish Pujari, learned Addl.G.A. for the State.

Dated: 27.10.2007

Hon'ble Dharam Veer, J.

This criminal appeal, preferred under Section 374 (2) of The Code of Criminal procedure, 1973 (hereinafter referred to as Cr.P.C.) is directed against the judgment and order dated 07.12.1989 passed by Sessions Judge, Pauri Garhwal in Sessions Trial No.26 of 1988, State v. Vinod Kumar alias Binnu and others, whereby the learned Sessions judge has convicted appellants Vinod kumar alias Vinod Buchar and Mumtaz Buchar under Sections 366, 368 and 376 of The Indian Penal Code, 1860 (hereinafter referred to as I.P.C.) and awarded sentence for four years' R.I. under Section 366 I.P.C., four years' R.I under Section 368 I.P.C. and four years' R.I. under Section 376 I.P.C. to each of the appellants and it has been directed that all the sentences of both the accused shall run concurrently and accused

Vinod Kumar alias Binnu has been acquitted for the offence punishable under Sections 368 & 376 I.P.C.

2. Learned C.J.M., Pauri Garhwal has submitted a report dated 18.05.2006 that appellant Vinod Kumar alias vinod Buchar died. Hence, the appeal against appellant Vinod Kumar alias Vinod Buchar stands abated.

3. In brief, the prosecution case is that complainant Gama Das lodged an F.I.R. at Patwari Circle padulsyu-3, Buakhal with the averment that Smt. Sarojni Devi had come to his house and she stayed there in the night. Next day morning, i.e. 07.11.1987, she had taken his daughter-in-law Pushpa Devi to village Bhainsora and Pushpa Devi could not come back to his house up to two to three days. On 11.11.1987 Sarojni Devi met his wife (wife of the complainant) and she had told her that on 09.11.1987 Vinod Buchar had met them in the way when they were coming back to their house and asked Sarojni Devi that he had called a proficient Vaidhya (Doctor) for her treatment then he and Pushpa Devi had gone along with Vinod Buchar by bus to Pauri and Vinod Buchar took her and Puchpa Devi to Kandoliya in the house of one Daya Ram Buchar Where they were kept in the night. Vinod Buchar kept Pushpa Devi with him and Daya Ram kept Sarojni Devi with him in that night. In the morning of 10.11.1987 Vinod Buchar went along with Pushpa and she was remained in the house of Daya Ram and in the night Daya Ram committed rape with her. He has further stated that his daughter-in-law Pushpa Devi had gone along with the clothes and ornaments. With the same averments the

F.I.R. was lodged on 12.11.1987 at 9.00 AM while the distance between the place of occurrence and the office of Patwari has been shown three kilometers, that F.I.R. is Ex.Ka-1 and on the basis of this F.I.R., the *Chik* F.I.R. was prepared by the Patwari (in the rural areas of hill Districts of Uttarakhand the Patwaris are vested with the police powers), that *Chik* F.I.R. is Ex.ka-2. The entry was made in the G.D., the copy of G.D. is Ex.Ka-3. During the Course of investigation, the Patwari (Investigating Officer) recorded the statements of the witnesses and the victims and also inspected the place of occurrence and prepared a site plan, i.e Ex.Ka-4 Sarojni Devi was given in the Supurdagi of his brother Virendera Lal and Supurdaginama was prepared, i.e.Ex.Ka-5. The petticoatof Sarojni Devi was also taken into possession and *Fard* was prepared, that *Fard* is Ex.Ka-6. he has also prepared a site plan of the house of accused Vinod Kumar alias Binnu, i.e. Ex.Ka-8. Victim Sarojni Devi was medically examined by the Medical Officer, Female Hospital, Pauri Garhwal on 13.11.1987 and medical report was prepared by the Medical Officer, i.e. Ex.Ka- 10. Smt. Pushpa Devi was also medically examined by the Medical Officer, Female Hospital, Pauri Garhwal on 21.11.1987 and the medical report was prepared, i.e Ex.Ka-11. After completing the investigations, the Patwari submitted the charge sheet against the present appellants and co-accused Vinod Kumar alias Binnu, who has been acquitted by the trial court. That charge sheet is Ex.Ka-9.

4. Learned Munsif Magistrate, Pauri Garhwal committed the case to the court of Session on

01.09.1988 under Section 209 Cr.P.C. after complying the provisions of Section 207 Cr.P.C.

5. Learned Sessions Judge, Pauri Garhwal framed charges against appellants Vinod Kumar alias Vinod Buchar and Mumtaz Buchar under Sections 366, 368 & 376 I.P.C. on 26.10.1988 and the charges were read over and explained to the appellants who pleaded not guilty and claimed to be tried. Learned Sessions Judge also framed charges against co-accused Vinod Kumar alias Binnu under Sections 368 and 376 IPC on 26.10.1988 and the charges were read over and explained to him, who also pleaded not guilty and claimed to be tried.

6. To prove its case the prosecution examined P.W. 1 Gama Das (complainant), P.W.2 Smt. Pushpa Devi (victim), P.W.3 Smt. Sarojni Devi (victim) and P.W.4 Ghanshyam Singh, Patwari (Investigating Officer). After that the statement of the appellants and co-accused were recorded under Section 313 Cr.P.C., who denied the allegations made against them and in defence they did not produce any oral or documentary evidence.

7. After appreciating the evidence on record and hearing learned counsel for both the parties, learned Sessions Judge, Pauri Garhwal has convicted appellants Vinod Kumar alias Vinod Buchar and Mumtaz Buchar under Sections 366, 368 and 376 of I.P.C. and awarded sentence for four years' R.I. under Section 368 I.P.C., four years' R.I. under Section 368 I.P.C. and four years' R.I. under Section 376 I.P.C. to each of the appellants and it has been directed that all the sentences of both the

accused shall run concurrently and accused Vinod Kumar alias Binnu Has been acquitted for the offence punishable under Sections 368 & 376 I.P.C.

8. Against the said judgment and order, the appellants have preferred the instant appeal.

9. I have heard Sri U.P.S. Negi, learned counsel for the appellants as well as Sri Harish Pujari, learned Additional Government Advocate for the State and perused the entire record of the trial court.

10. To prove its case the prosecution has examined P.W.1 Gama Das, who has stated in his statement that he is a tailor by profession and Pushpa Devi is his daughter-in-law and Sarojni Devi is his sister-in-law (Sali). On 06.11.1987 Sarojni Devi had come to his house and had taken Pushpa along with her to village Bhainsora. When pushpa could not come back to the house then he started to search her. He had sent his son Vinod to village Bhainsora then he came to know from Vinod that Sarojni Devi and Pushpa Devi had gone from there on 09.11.1987. On 10.11.1987, one teacher had informed him that she had seen Pushpa Devi and Sarojni Devi in Pauri Market. On 11.11.1987, Sarojni Devi met to his wife and told her that on 09.11.1987 Vinod Buchar met her and asked her that there was a proficient Doctor in Kandoliya and she might take treatment from him then she and Pushpa went to Kandoliya along with Vinod Buchar and reached at the shop of Mumtaz Buchar. Up to the evening, the Doctor was not available as informed by Vinod Buchar that some guests had come in his house and in the night, in the house of Mumtaz, Mumtaz

Buchar committed rape with Sarojni and Vinod Buchar committed rape with pushpa. Next day morning, Vinod Buchar came to Kotdwara along with Pushpa Devi. After that Sarojni Devi came back form the house of Mumtaz. He went to the Patwari along with Sarojni Devi and given a report to the Patwari, that report is Ex.Ka-1. In cross-examination, he has stated that Pushpa is about 20 years old and she has one daughter also. Sarojni Devi is about 21-22 years old and she has got no child. The marriage of Sarojni Devi had taken place before five years and she was divorced by her husband before three years of this incident. He has further stated that Bhainsora village is about 5-6 kms from his village and the distance between Bhainsora and Pauri is 10-12 Kms and Pauri is about 5-6 Kms from Buakhal. He has further stated that his daughter-in-law went from the house without any ornament. He has further stated in the cross-examination that after nine days of reaching of Sarojni to his house Pushpa came to his house along with her father Vikram Singh and Vikram Singh told him that Pushpa had come along with him from his house at Delhi where Pushpa had gone along with Vinod alias Binni. He has further stated that on 10th November 1987 he came to know that Sarojni and Pushpa were in Pauri then he went to Pauri to search Sarojni Devi and Pushpa Devi but he could not get them. He has further stated that for the same averment he has not lodged the F.I.R. on 10th November 1987. He has further submitted that Vinod Kumar alias Binnu and Mumtaz, who were present in the court were not known to him but Vinod Kumar alias Vinod Buchar was known to him. He has further stated that no identification parade was held before the Magistrate. He has further submitted that in his report it

was wrongly written that his daughter-in-law had gone along with the clothes and ornaments. She had gone with only silver Paijeb.

11. P.W.2 is Smt. Pushpa Devi. Sessions Judge has observed by a special note that she appears to be about 25 years old. She has stated that she was married before five years with Vinod Das and after the marriage she was living in the house of her father-in-law Gama Das and Sarojni Devi is her mother-in-law in relation who was the resident of village Bhainsora. The said incident had taken place about 1-1/2 years in the month of November. On 6th November Sarojni had come to her village. On 7th November she had gone to Bhainsora village and on 8th November she remained there and on 9th November when she and Sarojni was coming to Buakhal, Vinod Buchar met them in the way then Vinod Buchar asked to Sarojni Devi for a better treatment by a proficient Doctor in Kandoliya then she and Sarojni went to Kandoliya along with Vinod Buchar. They reached at the shop of Mumtaz and Vinod Buchar went to call the Doctor. Vinod Buchar came after2-3 hours and told that some guests had come in the house of Doctor and in the night Mumtaz committed rape with Sarojni and Vinod Buchar committed rape with her. Next day morning, she went along with Vinod Buchar to Kotwara by bus. Vinod Kumar alias Binnu met her and Vinod Buchar went from the bus somewhere else. From there she went along with Vinod Kumar alias Binnu to his room and she remained there with Vinod Kumar alias Binnu for three days and there Vinod Kumar alias Binnu also committed rape with her then she went to Delhi, her parents' house, along with Vinod Kumar alias Binnu. She reached at the

house of her parents then she told the said incident to her father. Her father came to Buakhal along with her and she was handed over in the custody of her father-in-law and mother-in-law. After that she was medically examined in the Female Hospital, Pauri Garhwal. In the cross-examination, she has stated that in Delhi, from the railway station to her father's house, Vinod kumar alias Binnu and she herself went from one scooter and from Kotdwara to Delhi both of them went by bus. In Delhi they reached by bus at 7-8.00 PM and in the bus so many passengers were there. Bus was full of passengers from Kotdwara and at the bus station Kotdwara police were also there and there was a mob of 60 to 70 persons at the bus station and the day was sunny but she did not make noise at the bus station. She has further stated that at the bus station a teacher of Buakhal had seen her. She has further stated that the shop of Mumtaz is about 3-4 hands in length and breadth and in front of the shop of Mumtaz 6-7 shops were also there. She has further stated that they had taken meal in the house of Mumtaz in the night and she and Sarojni had taken food in the shop of Mumtaz. She has further stated that when she was going to Kotdwara, she had taken tea at Satpuli along with Vinod Kumar alias Binnu. She has further stated that Vinod Kumar alias Binnu. Was living in a room at Kotwara along with his mother and his mother used to cook food for her also.

12. P.W.3 is Smt. Sarojni Devi. Sessions Judge has observed by a special note that she appears to be about 25 years of age. She has stated that she was married before four years with Roshan Lal and about two years before her husband had divorced her and since

then she was living along with her parents. The incident had taken place about two years before. The date was 6th November 1987. On that date she had gone to Buakhal and she had taken Pushpa Devi from there. She along with Pushpa Devi went to Bhainsora on 7th November 1987. On 7th and 8th November 1987 both of them lived at Bhainsora. On 9th November 1987 when she and Pushpa Devi were coming back to Buakhal, Vinod Buchar met them and he was known to her before the said incident. Vinod Buchar asked them that there was a proficient Doctor in Dandoliya and for the treatment they went along with Vinod Buchar to Kandoliya. They stayed in the shop of Mumtaz l;and Binod Buchar went to take the Doctor and he returned about 3-4 PM. In the night Vinod Buchar committed rape with Pushpa Devi and Mumtaz committed rape with her. Next day morning, Vinod Buchar went along with Pushpa Devi to Kotdwara and on 11th November 1987 she came from Kandoliya to Buakhal and narrated the incident to Gama Das. She was medically examined after2-3 days of reaching at Buakhal. In cross-examination, she has stated that Pushpa Devi had gone along with her after giving information to her husband and father-in-law. She has further stated that she had reached at the shop of Mumtaz at 10.00 AM and stayed at the shop up to 4-5.00 PM. About 4-5.00 PM in the evening Vinod Buchar had reached there. She has further stated that both the sided of Mumtaz's shop there were other shops also. She has further stated that when she had reached at the shop of Mumtaz, he was selling meat and nearby his shop customers were also there.

13. P.W.4 is Ghanshyam Singh Patwari (investigating Officer), who has stated that in the month of November 1987 he was posted as Patwari in Patti-Padulsyu and Buakhal was also in his area. On 12.11.1987 Gama Das had given a report, i.e. Ex.Ka-1. On the basis of this report, he prepared a Chik F.I.R i.e. Ex.Ka-2 and the entry was also made in the G.D., the copy of G.D. is Ex.Ka-3. During the course of Investigation, he recorded the statement of witnesses and prepared the site plan and also prepared map of the place of occurrence, i.e.Ex.Ka-4. Sarojni Devi was given in the Supurdagi of his brother and Supurdaginama was prepared, i.e. Ex.Ka-5 and the petticoat of Sarojni Devi was also taken into possession and *Fard* was prepared, i.e. Ex.Ka-6. On 19.11.1987, Pushpa Devi had come in the Chawki along with her father and father-in-law and after that she was given in the Supurdagi of her father-in-law. Later on, on 21.11.1987 Pushpa Devi was sent for medical examination. The site plan of the house of Vinod Kumar alias Binnu was also prepared, i.e.Ex.Ka-8. After completing the investigation, he filed the charge-sheet, i.e. Ex.Ka-9. In cross-examination, he has stated that behind the shop of Mumtaz there were office and residential quarters of the Forest Department and both the sided of shop of Mumtaz there were other shops also and Mumtaz's shop was in the market.

14. After that the statement of appellants and co-accused were recorded under Section 313 Cr.P.C, who denied the allegation made against them and in defence they did not produce any oral or documentary evidence.

15. Sri U.P.S. Negi, learned counsel for the appellants has argued that on the basis of the evidence available on record, no offence under Sections 366 IPC is made out against appellant Mumtaz Buchar. For that he has submitted that as it has come in the evidence of P.W.2 Smt. Pushpa Devi and P.W.3 Smt. Sarojni Devi that Vinod Buchar had taken them from Beladhar. He has sumbmitted that both the girls were taken from the Beladhar, which is in the way of Bhainsora and Buakhal, by Vinod Buchar alone. For that reason, no offence is made out against appellant Mumtaz Buchar under Section 366 IPC because whatever the allegation for taking the victims form Beladhar to Kandoliya is against Vinod Buchar. For that Section 366 IPC is reproduced as under:-

> ***"366. Kidnapping, abducting or inducting woman to compel her marriage, etc. –*** *whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; [and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid]."*

16. From the evidence discussed above, Smt. Sarojni Devi and Smt. Pushpa Devi, who were the eye

witnesses of the case the victims also have clearly stated what Vinod alias Vinod Buchar had taken them to Kandoliya for the treatment of Smt. Sarojni Devi by the Doctor. There is no evidence against appellant Mumtaz Buchar that he had kidnapped or abducted Smt. Sarojni Devi and Smt. Pushpa Devi from Beladhar to Kandoliya, hence no offence under Section 366 IPC is made out against appellant Mumtaz Buchar.

17. Learned counsel for the appellants has further submitted that for the offence under Section 368 IPC, it is essential factor that a person who either wrongfully conceals or confines the victim, must have the knowledge that, the victim had been kidnapped or had been abducted. He has further submitted that Smt. Sarojni Devi or Smt. Pushpa Devi has never stated in her evidence that Mumtaz Buchar knew that Vinod Buchar had abducted or kidnapped them against their consent and that fact was proved by the prosecution evidence. Hence, no offence under Section 368 IPC is made out against appellant Mumtaz Buchar. In support of his argument, learned counsel for the appellants has cited a judgment rendered by Hon'ble Supreme Court in the case of **Puran Singh and another** v. **State of Bihar** reported in 2001 (43) ACC 1102 and he has relied on para-3, which is quoted below:-

> *"We shall first take up the case of appellants Puran Singh and his wife Lakhbir Kaur (appellants in Cri. Appeal No.622/2000). The entire evidence against them revolves around the statement made by the informant PW-8. According to her, she was taken to Haidargarh in a car by Narendra Singh who was accompanied by his mother and*

sister a also daughter of his sister. There she was confined in a room in the house of Puran Singh where the windows had been covered by plastic sheets. She stayed in that room for almost 5 months.

Since sine qua non for attracting provisions of Section 368 IPC is that a person who either wrongfully conceals or confines the victim, must have the ***knowledge*** *that, the victim had been kidnapped or had been abducted and on proof of that, the accused can be punished in the same manner as if he had kidnapped or abducted the victim with the same intention or knowledge, or for the same purpose as that with which he concealed or detained that victim. In vain have we searched through the record for any allegation, let alone proof that either of the appellants knew that PW-8 had been kidnapped or abducted by Narendra Singh. It is not the case of PW-8, the informant that she had told so at any point of time to either Puran Singh or his wife. The prosecution has also while recording the statement of these two appellants sunder Section 313 Cr.P.C. not put to them that either of them had knowledge that PW-8 had been kidnapped or abducted, and with that knowledge they had wrongfully concealed or confined PW-8 in their room. There is no material at all on the record which can being home the guilt of the appellants Puran Singh and Lakhbir Kaur for an offence under Section 368 IPC. Even it be assumed for the sake of arguments, that PW-8 was taken to the house of Puran Singh and confined there in a room by Narendra Singh, the possibility that Puran Singh, the possibility that Puran Singh and his wife thought that PW-8 was in fact the wife of Narendra Singh cannot be ruled out. According to the prosecutrix herself, she had gone to the house of Puran Singh with sindoor in the parting of her hair. He, therefore, could have no reason even to suspect that PW-8 had either been kidnapped or abducted. In the absence of any evidence to connect these two*

appellants with the requisite knowledge their conviction and sentence for an offence under Section 368 IPC cannot be sustained. Both the appellants are, therefore, entitled to be given benefit of doubt, which we do hereby give them. Consequently, their appeal succeeds. Their conviction and sentence are set aside. Their bail bonds shall stand discharged. Fine, if any, paid by them shall be refunded to them"

18. From the evidence discussed above, it is clear that appellant Mumtaz Buchar did not confine or wrongfully conceal Smt. Sarojni Devi and Smt. Pushpa Devi with prior Knowledge that they had been kidnapped or had been abducted. Moreover, Sarojni Devi or Smt. Pushpa Devi has never stated in her evidence that Mumtaz Buchar knew that Vinod Buchar had abducted or kidnapped them against their consent and that fact was proved by the prosecution evidence. Hence, no offence under Section 368 IPC is made out against appellant Mumtaz Buchar.

19. Learned counsel for the appellants has further submitted that on the basis of the evidence discussed above, no offence under Section 376 IPC is made out against the appellants. For that he has submitted that Vinod Buchar, who had committed rape with Smt. Pushpa had died, hence the appeal stands abated against him and the allegation against appellant Mumtaz Buchar is only that he had committed rape with Smt. Sarojni Devi in his shop. He has further submitted that victim Smt. Sarojni Devi was a consented party and she was major at the time of incident, as per the observation of the learned Sessions Judge that she appears to be 25 years of age and as per the statement of P.W.1 Gama Das

she was about 21-22 years of age and Smt. Pushpa Devi was also 20 years of age and as per the observation of the learned Sessions Judge, Smt. Pushpa Devi was also 25 years of age on the date of her statement and in the medical report the age of both the victims has been shown 18 years. Thus, both the victims were major on the date of incident and it has been admitted by the prosecution also that the victims were major on the date of incident and it is also clear from the record that both the victims were major on the date of incident. He has further submitted that in the evidence of Smt. Sarojni Devi, it has come that she was a married lady and was married before four years with Roshan Lal and about two years before the said incident her husband had divorced her due to the reason that she was suffering from T.B.

20. Learned counsel for the appellants has further submitted both the victims, viz. Smt. Sarojni Devi and Smt. Pushpa Devi were major at the time of incident and were consented parties as they had traveled number of cities and densely populated areas by bus and scooter etc. but they had not made any complaint to anybody and they had also not made noise anywhere. This conduct of the victims also shows that they were consented parties and were major at the time of the said incident. In support of his argument learned counsel for the appellants has cited a judgment rendered by the Hon'ble Supreme Court in the case of **Narayan alias Naran** v. **State of Rajasthan** reported in (2007) 3 SCC (Cri) 198 he has relied on paras 11, 12, 13 & 15 which are as follows:-

> *"11. in the cross-examination the prosecutrix (PW 3) stated that she boarded the trolley at about 5 o'clock in the evening*

and by 7 o'clock they reached Singpur village. There were number of villages between Singhpur and Akodiya. It is also required to appreciate that she stated in her evidence that even after the accused committed rape on her she sat in the tractor happily. It is not stated by her in her evidence that she raised any hue and cry even while passing through the number of villages. In the first information report (Ext.P-5) she stated that the accused committed rape on her thrice but in the evidence she stated that the accused committed rape on her only twice and not thrice. According to her the rape was committed on her on kankar (rough way). She did not state that she offered any resistance though she was physically very strong. Medical report (Ext.P-1) says that there were no injuries on the body of the prosecutrix (PW 3). There were no injuries on her private part. It is ultimately opined that "no definite opinion can be given regarding rape, however, she is habitual to sexual intercourse". In the circumstances, is it possible to believe that the prosecutrix (PW 3) has been subjected to rape twice by the accused as alleged? In the first information report (Ext.P-5) it is stated that the prosecutrix (PW 3) has been subjected to rape by the accused thrice but in her evidence she stated that she had been subjected to rape only twice. The accused even according to the prosecutrix (PW 3) was driving the tractor from Singhpur to Bharkiya crossing through a number of villages. It is not stated by the prosecutrix (PW 3) that she made any attempt to get down form the tractor at any point of time. On the other hand, it is stated by her that she sat in the tractor happily.

12, yet another important aspect of the matter, in the first information report and as well as in her evidence the prosecutrix (PW 3) stated that she revealed the entire episode of committing rape on her by the accused to Smt Tejkanwar (PW 6) in

whose house in Akodiya Village she slept on the fateful night. She also state about the accused's snatching of Rs.1000 from her and also some jewellery. Smt Tejkanwar (PW 6) in her evidence did not state that the prosecutrix (PW 3) narrated the incident of rape committed on her by the accused to her. The evidence of the prosecutrix (PW 3) if full of material contradictions. There is no corroboration whatsoever from any of the witnesses, more particularly in the evidence of Smt Tejkanwar (PW 6) who is a material witness. It is true, the evidence of the prosecutrix (PW 3) itself, if acceptable, is sufficient to establish the charge against the accused but her evidence is so artificial with cannot be accepted.

13. In the circumstances, we are of the considered opinion that the prosecution miserably failed to establish the charge against the appellant for the offence punishable under Section 376 IPC.

15. For all the aforesaid reasons, we hold that the prosecution failed to establish the charges framed against the appellant for the offences punishable under Sections 376 and 392 IPC. The conviction as well as sentences imposed upon the appellant for the offences punishable under Sections 376 and 392 IPC are accordingly set aside."

21. From the evidence it has also come that Smt. Sarojni Devi had started her journey on 6th November 1987 form her house Bhainsora and she had come to Buakhal on 6th November 1987 and she stayed in the house of Smt. Pushpa Devi on 6th Novmber 1987. On 7th November 1987 she had taken Smt. Pushpa Devi along with her with the consent of her husband and her father-in-law and she went to her village Bhainsora where both of them stayed on 7th and 8th November 1987

and on 9th November 1987 they started their journey to Buakhal and in the way to Buakhal they met Vinod Buchar and Vinod Buchar told Smt. Sarojni Devi that there was a proficient Doctor in Dandoliya, who could give her better treatment. On this, both Smt. Sarojni Devi and Smt. Pushpa Devi went to Kandoliya with Vinod Buchar. Kandoliya is a residential and densely populated area of Puri city. The Doctor was not available as there were some guests at his house, so they were sitting in the shop of Mumtaz Buchar from 10.00 AM to 5.00 PM and later on, they stayed in the house of Mumtaz in the night and as per the allegation Mumtaz committed rape with Smt. Sarojni Devi and Vinod Buchar committed rape with Smt. Pushpa Devi. Next day morning Pushpa Devi went along with Vinod Buchar to Kotdwara with her own consent by bus and in Kotdwara she stayed along with another co-accused Vinod Kumar alias Binnu. From there she went along with Vinod Kumar alias Binnu to his room and she remained there with Vinod Kumar alias Binnu for three days and then she went to Delhi, her parents' house, along with Vinod Kumar alias Binnu. She came back to her village Buakhal from Delhi after 9-10 days and she was medically examined in the Female Hospital, Pauri Garhwal on 21.111987. On the other hand, Smt. Sarojni Devi went from the shop of Mumtaz on 11.11.1987 to Buakhal and narrated the incident to the wife of Gama Das that Mumtaz had committed rape with her and Pushpa Devi had been committed rape by Vinod Buchar. Smt. Sarojni Devi also told to Gama Das that Dayaram had committed rape with her and Vinod Buchar had committed rape with Pushpa Devi and on the information of Smt. Sarojni Devi Gama Das lodged F.I.R.

On 12.11.1987 to the Patwari Circle Padulsyu, Pauri Garhwal.

22. From the evidence on record, it comes out that Smt. Sarojni Devi had started her journey from Bhainsora to Buakhal and Buakhal to Bhainsora and Bhainsora to Beladhar and again Beladhar to Kandoliya that is busy area and from Buakhal to Bhainsora is about 5-6 Kms and from Bhainsora to Kandoliya is about 10-12 Kms and they had traveled these journeys with their own consent and they were remained out of the house from 9th to 11th November 1987 and Smt. Pushpa Devi was remained out of the house from 7th to 21st November 1987. Smt. Pushpa Devi traveled from Buakhal to Bhainsora and from Bhainsora to Kandoliya and Kandoliya to Delhi by bus and by scoter etc. Accordingly, Smt. Pushpa Devi traveled about 500 Kms by bus and scooter along with number of people and she traveled number of cities but she neither made noise nor did complaint to anybody, which shows that she was a consented party and Smt. Sarojni Devi, who had taken Smt. Pushpa Devi along with her was also proved to be a consented party because she had not complained herself to any of the police authorities or to Patwari about the said incident but she had told this story to the wife of Gama Das when the wife of Gama Das had asked her. This conduct of Victim Smt. Sarojni Devi and victim Smt. Pushpa Devi shows that they were consented parties and whateve incident had happened had happened with their own consent. Both of them were major and were more than 18 years of age on the date of incident, as the evidence discussed above and they had traveled number of cities and densely populated areas but they had not

complained to any body. This conduct of the victims shows that they were consented parties for the incident.

23. Learned counsel for the appellants has further submitted that on the same set of evidence co-accused Vinod kumar alias Binnu has been acquitted by the learned Sessions Judge and on the same set of evidence appellant Mumtaz Buchar cannot be convicted. He has cited a judgment rendered by Hon'ble Supreme Court in the case of **Deepak Rajak** V. **State of West Bengal** reported in 2007 AIR SCW 5740 and he has relied on para nos.2, 3, 5 & 6 which are as follows:-

> *"2. The factual details need not detain us as undisputedly the co-accused have been acquitted by this Court in Mousam Singha Roy and others v. State of W.B. [2003 (12) SCC 377}. The effect of such acquittal vis-a-vis similarly situated co-accused has been considered by this Court in several cases.*
> *3. Learned counsel for the appellant placed reliance on various decisions of this Court contending that the benefit of acquittal should be extended to the appellant.*
> *5. The position in law as to what happens in case of acquittal of similarly placed co-accused on the same set of facts and on similar accusations has been considered by this Court in several cases.*
> *6. A departure may be made in cases where the accused had not surrendered after the conviction in addition to not filing an appeal against the conviction. But as in the present case, after surrender, the benefit of acquittal in the case of co-accused on similar accusations can be extended."*

24. Learned counsel for the appellant has also cited a judgment on the same set of evident rendered by the Hon'ble Supreme Court in the case of **Joginder**

Singh and others v. State of Punjab reported in reported in 1994 SCC (Cri) 46. he has relied on para 3 of the said judgment, which is quoted below:-

> *"3. the accused denied the offence and stated that they were falsely implicated. The prosecution case rested on the evidence of PW 3, the father of the deceased and PW 4 who claimed to be an eyewitness. The trial court convicted six of the accused persons, as already stated. The trial court considered their evidence and observed that the possibility of false implication of three of the convicted accused cannot be ruled out. Having stated so, the High Court acquitted three of the accused. At more than one place, the High Court pointed out that the false implication of the acquitted accused cannot be ruled out. Without further discussion, the High Court convicted the three appellants solely on the ground that they had motive to attack. It may be mentioned that the evidence of PWs 3 and 4 is to the effect that quite a few of the acquitted accused inflicted injuries with sharp-edged weapons. But their evidence is rejected in respect of other five accused solely on the ground that they could have been falsely implicated. In our view, the same reasoning applies to the case of the present appellants also. If that be the position, the appellants cannot be treated as a different category merely on the basis they could not have been convicted when the evidence of the eyewitness was found to be highly unsatisfactory. The High Court has committed an error in convicting the present appellants having rejected the evidence of the eyewitnesses in respect of the other accused."*

25. On the basis of the aforesaid judgments learned counsel for the appellants has contended that on the basis of same set of evidence, co-accused Vinod

Kumar alias Binnu has been acquitted by the trial court and the present appellant Mumtaz Buchar has been convicted. He has further submitted that in view of the judgment of Hon'ble ApexCourt rendered in the case of joginder Singh (Supra) on the basis of the same set of evidence the present appellant Mumtaz Buchar cannot be convicted when the accused person has been acquitted by the trial court on the same set of evidence.

26. From the perusal of the record, it is also clear that on the same set of evidence co-accused Vinod Kumar alias Binnu has been acquitted by the trial court and appellant Mumtaz Buchar has been convicted, which is not justiceable as per the dictum made by the Hon'ble Apex Court in the case of *Deepak Rajak* and *joginder Sing* **(supra)**. Hence, appellant Mumtaz Buchar is also entitled for acquittal on the same set of evidence.

27. Arguments of the learned counsel for the appellants have got weight and sustainable as per the above said dictums made by the Hon'ble Supreme Court and the appellant Mumtaz Buchar is liable to be acquitted.

28. Learned counsel for the appellants has further submitted that the F.I.R. in the above said case was lodged on 12.11.1987 whereas the victims had gone from the house on 7.11.1987 and the delay in lodging the F.I.R. has not been explained in the prosecution story that is fatal for the prosecution case. In support of his submission, learned counsel for the appellants has cited a judgment rendered by the Hon'ble Supreme Court in the case of **State o Karnataka v. Mapilla P.P. Soopi**

reported in (2003) 8 SCC 202. he has relied on para-4 which is as follows:-

> "Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence, the High Court was justified in allowing the appeal."

29. From the evidence discussed above, it comes out that the delay in lodging the F.I.R. has not been explained properly either in the F.I.R. or in the statements of the witnesses that is also fatal for the prosecution and also creates doubt in the prosecution story.

30. After considering all the facts and circumstances of the case as narrated above and the dictum made by the Hon'ble Apex Court in the aforesaid judgments, the judgment of the court below is not justified and correct, as per the law and the evidence available on record.

31. Accordingly, the appeal is allowed. Judgment and order dated 07.12.1989 passed by Sessions Judge, Pauri Garhwal in Sessions Trial No.26 of 1988 as well as the conviction and sentence made against appellant Mumtaz Buchar in the above said Sections is hereby set aside. Since appellant Vinod Kumar alias Vinod Buchar died during the pendency of the instant appeal, as such the appeal against Vinod Kumar alias Vinod Buchar stands abated.

32. Since Appellant No.2 Mumtaz Buchar is on bail, as such he need not to surrender. His bail bonds are cancelled and sureties are discharged.

(Dharam Veer, J.)

27.10.2007
RBS